BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

TROY AND TRACY DENTON, et al.,

Complainants,

vs.

QWEST CORPORATION,

Respondents.

Docket No. T-01051B-02-0535
(Consolidated)

QWEST CORPORATION'S MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES, AND ALTERNATIVE MOTION TO FURTHER CONSOLIDATE

Pursuant to Rule 19 of the Arizona Rules of Civil Procedure and 47 U.S.C. 214(e)(3), Qwest Corporation ("Qwest") moves to dismiss the above-captioned proceeding for failure to join indispensable parties. In order to exercise its authority to force telecommunication service providers to serve customers outside of their service areas in Arizona, the Commission must make a series of specific factual and legal determinations, including "which common carrier or carriers are best able to provide such services for that Unserved community . . . ." 47 U.S.C. § 214(e)(3). As explained below, the facts necessary for the Commission to order service in this case cannot be properly found because Qwest is the only Arizona carrier currently before the Commission in this matter. Alternatively, pursuant to A.A.C. R14-3-109(H), Qwest moves to seek a just and final resolution of these matters, consistent with statutory authority, by consolidating the above captioned proceedings with Docket No. RT-00000H-97-137 concerning

Proposed Amendments to the Universal Service Fund ("USF"). Qwest's Motions are supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE COMMISSION LACKS AUTHORITY TO FORCE QWEST TO SERVE OUTSIDE ITS TERRITORY WITHOUT MEETING THE REQUIREMENTS OF 47 U.S.C. § 214(E)(3).

On October 21, 2002, the Utility Division Staff ("Staff") filed a Reply to Qwest's Answer to the consolidated complaints. In the Reply, Staff makes several legal assertions regarding the Commission's authority to force a telecommunication provider, specifically Qwest, to provide service outside of its service territory. In addition to 47 U.S.C. § 214(e)(3), Staff relies on *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Com'n*, 177 Ariz. 49, 864 P.2d 1081 (App. 1993), and *In the Matter of the Application of Arivaca Townsite Coop. Water Co. for an Extension of its Certificate of Convenience and Necessity*, Decision No. 59546, both relating to the provision of water services in a monopoly setting, to support its assertions. For the reasons set forth below and because, as Staff points out in its Reply, the provision of telecommunication services presents issues not applicable to other public utilities, these cases do not apply and can not provide the Commission authority to compel the provision service outside of Qwest's territory.

Moreover, Staff, while admitting that telecommunication services are different than those provided by other utilities, completely ignores its own precedent regarding the same industry, the same telecommunication carrier (Qwest), and substantially similar circumstances. *See, e.g., Bruce Walker v. U S WEST Communications, Inc.*, Docket No. E-1051B—96-543, Decision No. 60175; *Don B. Miller and Moira L. Miller v. U S WEST Communications, Inc.*, Docket No. E-1051B-97-130, *Bryan & Pam Dellinger v. Qwest Corporation*, Docket No. T-01051B-01-0354,

Decision No. 64828. As Staff points out, the Commission "has not to date, through a formal decision, required Qwest to involuntarily extend services to consumers outside of its service area."[1] Staff's Reply Comments to Qwest Corporation's Consolidated Answer ("Staff's Comments") *at* 1. Rather, the Commission in *Miller*, *Walker* and *Dellinger*, has determined repeatedly that Qwest is not obligated to provide telecommunication services beyond its service territory boundaries. In fact, *Miller* and *Dellinger*, like this Complaint, both involved individuals who had received service outside of Qwest's territory and complainants who were denied service because they were outside of Qwest's territory.

Staff's reliance on 47 U.S.C. § 214(e)(3) presents a matter of first impression with significant implications for all telecommunication and other service providers as well as the ever-increasing number of Arizona residents in unserved areas. This matter will require the Commission's consideration of broad policy concerns, inclusion of other Arizona telecommunication carriers, the application of USF mechanisms not yet established, and the application of procedures that will affect the outcome of similar cases in the future. *See also* Staff's Comments at 2:14-15; 3:2-4; 4:19-5:2. For these reasons, the issues raised in this case should not, and cannot as a matter of law, be addressed in the limited context of the present proceeding. Therefore, Qwest moves to dismiss the Consolidated Complaints.

A. <u>Tonto Creek and Arivaca Water Do Not Apply to the Present Case.</u>

Staff states that the Commission may rely on *Tonto Creek* for authority to order involuntary service outside of Qwest's service territory in Section 11.[2] In *Tonto Creek*, the Commission ordered the current operator of a water system to assume a certificate of

[1] Staff has also conceded that the Commission has not ordered involuntary service "informally." Arizona Corporation Commission Staff's Response to Qwest Corporation's Second Set of Data Requests *at* 2.4.
[2] "Section 11" refers to the Section where Complainants' properties are located. The legal description is Township 15 North, Range 1 West, Section 11.

convenience and necessity ("CC&N") issued to other persons and, as a result, to provide service to an area that lay outside the boundaries of its original certificate. *Tonto Creek* is the only case in Arizona where a court has upheld a Commission Order extending a public service corporation's certificated service area absent the company's application and despite its objection.

Ultimately, the Court in *Tonto Creek* agreed with the Commission that "[i]t is within the Commission's jurisdiction to order the [operator] to provide service to all customers on a nondiscriminatory basis." *Id.* at 59, 864 P.2d at 1091. The Court upheld the Commission's order in *Tonto Creek* because it was supported by evidence that the company was already providing water service to many lots in the transferred area and had thereby evidenced intent to serve the public within that area. Moreover, the water company had, by this time, existing facilities that were capable of providing water service to almost every lot in the transferred area. Finally, the water company's refusal to provide service to some property owners was not based upon a policy restricting its service area, but because the potential new customers would not agree to discriminatory charges.

Tonto Creek is not applicable in the present case for a number of reasons. First, it is clear from the facts of the case that the owner/operator of the water utility service had manifested its intent to provide water to a particular area by purposely holding itself out as providing such service (as opposed to an inadvertent error). *Id.* at 53-4, 864 P.2d at 1085-86. The homeowners association, as owner/operator of the water system, in *Tonto Creek* made individualized determinations as to whether to furnish water to persons outside of its certificated area when a person requested water service. [3] *Id.* at 54, 864 P.2d at 1086. Unlike Qwest in the present case,

[3] "[T]he [owner/operator] prepared a form letter as a response to people outside of the certificated area who might request service. The letter told them that ***if the*** [owner/operator] ***decided to furnish water, it would be under the conditions of interior domestic use only, and terminable by the*** [owner/operator] ***at any time***." *Tonto Creek* at 54, 864 P.2d at 1086 (emphasis added).

the homeowners association never denied that it was the proper provider of water services to the area, only that it did not have to provide service to everyone who applied. *Id.*

The Commission's Decision in *Arivaca Water* is similarly inapplicable. *Arivaca Water* involved an initial application by the Arivaca Water Co. to extend its CC&N to include two parcels of property outside of its certificated area that the company had been serving without authorization for 17 years. A neighbor outside of the certificated area heard of the company's plans to extend and petitioned the Commission to be included in the expansion. Upon filing this petition, the water company moved to withdraw its line extension application to avoid having to serve the petitioner's parcel. The result would have been to sandwich the petitioner's property between the two already-served parcels. Ultimately, the Commission ordered the company to provide service to the petitioner in a "nondiscriminatory manner." In *Arivaca Water*, unlike the present case, the water company had been voluntarily serving outside of its certificated area for 17 years. It had never notified the Commission of this service but actively sought to include the property by applying to extend its CC&N.

The present Complaint is distinguishable in this regard. One need look no further than the Consolidated Complaints to see that Qwest has repeatedly denied service to the residents in Section 11. Those individual properties in Section 11 that have received Qwest service, which comprises only two service addresses, were given service in error. Pursuant to this Commission's own rules, A.A.C. R14-2-502(B), Qwest notified the Commission immediately upon discovering the mistake and was told by the Commission not to disconnect these addresses.[4] *See* April 30, 2001 letter from Maureen Arnold to Chris Kempley (attached hereto as Exhibit A). This was done prior to any Complaints being filed at the Commission. As such, the

Commission was aware of Qwest's inadvertent error in providing service to these two addresses. Such conduct is readily distinguishable from the "picking and choosing" that supported the Commission's decisions in *Tonto Creek* and *Arivaca Water*. Since the mistake was caught, Qwest has uniformly denied service to everyone in Section 11. If Qwest intended, desired or held itself out as providing service to these individuals, it would not have requested that the services be disconnected and it would not have consistently denied service in the area. More importantly, the Commission cannot create a "Catch-22" process whereby it requires notification of such inadvertent errors, refuses to permit termination of such service, and then characterizes the action as intentional discriminatory treatment.

Further, in *Tonto Creek*, the reason the owner/operator refused service to the property at issue in that case was because that customer would not agree to certain terms – higher rates and limited use. Those are precisely the type of utility service issues that this Commission has authority to ensure are not being addressed discriminatorily by public service providers. *See Tonto Creek* at 56, 864 P.2d at 1088 ("We have repeatedly held that the power to make reasonable rules and regulations and order by which a corporation shall be governed refers to the power to prescribe just and reasonable rates and charges."). Moreover, the Court limited the Commission's application of its powers in *Tonto Creek* to amending a prior **decision** in order to ensure service is provided in a nondiscriminatory manner, not to amending a service territory itself. In fact, the Court expressly refused to allow such an extension of the Commission's constitutional and statutory powers. *See Id.* at 56, 864 P.2d at 1088 ("[W]e can find no statute that specifically grants the Commission power to order the transfer of a certificate of convenience from one corporation to another."). There is no decision in the present case for the

[4] Qwest initially contacted Staff to inform the Commission of the error and was verbally told not to disconnect. Qwest then sent the April 30, 2001 letter to Mr. Kempley so that the Commission had something on file to confirm

Commission to alter or rescind. *See* Staff's Comments at 3:3-16. Thus, *Tonto Creek* simply cannot apply as Staff suggests.

Staff's own admissions and reasoning also make *Tonto Creek* and *Arivaca Water* inapplicable to the present case. Staff relies on *Tonto Creek* and *Arivaca Water* for the assertion that "since Qwest may be providing service to a non-contiguous property in Section 11, it should be required to revise its exchange boundary maps to include the entire section or half-section." First, there is nothing in the record of this case that establishes that Qwest is providing service to non-contiguous properties. Staff's argument fails because its premise is faulty. Second, there is nothing in either the *Tonto Creek* or the *Arivaca Water* decisions that supports Staff's contention that whether the Commission can force a public service provider to serve outside of its service territory is contingent on whether it has provided service to contiguous or non-contiguous parcels of property.

In its Reply, Staff points out that "while there may be similar policy considerations to an extent between the various industries the Commission regulates, there may also be differences that may warrant different actions...." Staff Comments at 3:25-27. *Tonto Creak* and *Arivaca Water* dealt with water utility providers. Water providers are regulated monopolies in Arizona. A holder of a CC&N for water service has a monopoly on the area that is included therein. As a result, water providers (or monopoly providers) are treated differently in situations such as this. Thus, the same concepts and reasoning applied in *Tonto Creek* and *Arivaca Water* simply cannot be relied on in a telecommunications setting.

In the *Arivaca Water* Decision, the Commission relied on *Davis v. Ariz. Corp. Comm'n*, 96 Ariz. 215, 218, 393 P.2d 909, 911 (1964) for the proposition that the Commission has authority under A.R.S. § 40-252 to rescind, alter or amend a CC&N. In its holding the *Davis*

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that service was being provided to these two addresses.

Court made clear the basis of its determination. "The monopoly is tolerated only because it is to be subject to vigilant and continuous regulation by the [Commission], and is subject to rescission, alteration, or amendment at any time upon proper notice when the public interest would be served by such action." *Davis* at 218, 393 P.2d at 911.

In interpreting that holding, the Arizona Supreme Court relied on Arizona's public policy regarding monopoly service corporations, such as water companies, that are given "a regulated monopoly over free-wheeling competition" and have exclusive rights to provide the relevant service. *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 429, 671 P.2d 404, 407 (1983). And, although "the public interest is the controlling factor in decisions concerning service of water by water companies, " it is only when a certificate holder has been given a chance but has failed to provide adequate service at a reasonable cost that it would be in the public interest to alter the company's certificate. *Id.* In so holding, the Court affirmed that it is the presence of monopolistic market characteristics, and perhaps the nature of the actual service, that provides support for any Commission action to alter a CC&N decision.

In fact, if the Commission were to apply the logic of *Tonto Creek* on its face to the present case, allowing the Consolidated Complaints to move forward in this proceeding would be a violation of the notice provisions of A.R.S. § 40-252. There are several active telecommunication carriers, none of which is Qwest, certified to provide telecommunication services statewide. *See* List of Statewide certificate holders attached as Exhibit B. At minimum, these certificate holders have a right to be notified of Staff's plans to transfer Section 11, their service area, to Qwest. *See Tonto Creek* at 57, 864 P.2d at 1089; *J.P. Paul Water Co.* at 430-31, 671 P.2d at 408-9. The Commission has an obligation to respect certificate holders' rights to

provide such service before it can order others to provide service to the certificated area. *J.P. Paul Water Co.* at 431, 671 P.2d at 409.

These cases do not provide authority for the Commission to order involuntary service in this proceeding. Because Qwest must operate in a fully competitive telecommunications market, Staff's reasoning and reliance on *Tonto Creek* and the *Arivaca Water* decision is simply inapplicable. In the present environment, Qwest cannot be treated as a monopolistic public utility because Qwest simply does not have the same ability to subsidize costs incurred as the result of Commission orders intended to further the public interest. The only authority that this Commission may rely on to force Qwest to serve outside of its territory is 47 U.S.C. § 214(e)(3).

B. The Commission's authority to order service in unserved areas must be exercised in accordance with 47 U.S.C. § 214(e)(3).

As the analysis of *Tonto Creek* and *Arivaca* clearly demonstrates, the current telecommunications market is vastly different from the traditional monopoly system governing local water companies. Commission staff has recognized the differences, and has pointed out that 47 U.S.C. § 214 establishes a specific framework for dealing with areas that do not have telecommunications service. *See* Staff's Comments at 3-4. Under specific circumstances § 214(e)(3) gives the Commission authority to order common carriers to provide the supported basic services to unserved areas within the state commission's jurisdiction. Section 214(e)(3) provides:

> (3) Designation of eligible telecommunications carriers for unserved areas
>
> If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a *State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that*

> *unserved community or portion thereof.* Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

47 U.S.C. §214(e)(3) (emphasis added). However, any state regulation intended to advance universal service must be "not inconsistent" with FCC rules. *See* 47 U.S.C. § 254(f). Because federal law regarding telecommunication services to unserved areas is clear and on point, the Commission must resolve these complaints in accordance with § 214(e)(3).

No action under § 214(e)(3) has been tested by either the FCC or the Commission, and neither the FCC nor the Commission has fully developed procedural rules for applying the subsection. The FCC has not issued a final order on implementing § 214(e)(3); it has given preliminary guidance in the form of its 1999 Further Notice of Proposed Rulemaking, FCC 99-204, 64 Fed. Reg. 52738 (1999) ("FCC Notice 99-204"). Despite the absence of fully promulgated regulations, it is clear is that before exercising its powers pursuant to § 214(e)(3), this Commission must make a series of factual determinations. Those determinations will require, at a minimum, the participation of other carriers in order to resolve these complaints.

Under § 214(e)(3), the Commission must first establish whether it has jurisdiction over this case. This includes a determination of whether the area is a "community" or portion thereof and whether that "community" is actually unserved as defined by the FCC. If the case does not fit within the statutory definition, the Commission simply does not have jurisdiction to order involuntary service. Second, if the case fits within § 214(e)(3), the plain language of the statute requires a determination of which common carrier is "best able" to provide service to the unserved community. The statute and regulations do not support Staff's presumption that the service must be provided to unserved areas by Qwest or another incumbent wireline carrier only.

1. Establishing Jurisdiction under § 214(e)(3).

The Commission's authority to order involuntary service under § 214(e)(3) is limited to areas that are "unserved." FCC Notice 99-204 at ¶ 86.

> "[I]n order to determine whether an allegedly unserved community is eligible for relief pursuant to section 214(e)(3), we must first decide whether the area at issue is unserved. Only after making this initial determination can we proceed with the rest of the analysis."

Id. Staff has indicated that the Commission's definition of unserved territory is an area that is "unserved by an incumbent local exchange carrier." Arizona Corporation Commission Staff's Response to Qwest Corporation's Second Set of Data Requests ("Response to 2nd Data Request") at 2.4 (attached hereto as Exhibit C). This definition is not supported under § 214(e)(3).

The FCC's proposed definition of an unserved area is "any area in which facilities would need to be deployed in order for its residents to receive each of the services designated for support by the universal service support mechanisms." FCC Notice 99-204, ¶ 86. The FCC Notice lists the services as follows: "single-party service; voice grade access to the public switched network; DTMF signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll-limitation services for qualified low-income consumers." FCC Notice 99-204, ¶ 86. If those services are available, the area cannot be classified as unserved.

Nowhere does the FCC suggest any link between the service status of an area and the existence of a nearby incumbent local exchange carrier; and nowhere does the FCC suggest that these services should be provided only by wireline carriers as Staff suggests. To the contrary, the FCC has made absolutely clear that the federal Telecommunications Act requires "competitive

neutrality." May 1997 Report & Order, FCC 97-157 ¶ 47, 62 Fed. Reg. 32862 (1997) ("FCC Order 97-157"). The competitive neutrality standard means that universal service support mechanisms must "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Id.* In establishing this principle, the FCC specifically rejected arguments that a traditional, non-competitive approach could be appropriate in high-cost rural areas. *Id.*, ¶ 50. Rather, the FCC recognizes the validity of other telecommunications technologies, such as wireless and satellite, in providing services to remote areas such as Section 11.

Using the FCC definition, the Prescott Valley area would not qualify as unserved under § 214(e)(3) if residents are currently receiving service through cellular carriers or other non-wireline technology. Qwest has found that a number of wireless providers advertise service to the area.[5] Moreover, all of the Complainants in this matter list a home phone number, and at least three are expressly listed as cellular. *See* White Complaint, T-0151B-02-0516; Limburg Complaint, T-0151B-02-0514; Fatheree Complaint, T-0151B-02-0513. Staff has admitted that the Commission has no information regarding the availability of non-wireline services in the Complainants' area. Response to 2nd Data Request at 2.3 (attached as part of Exhibit C). Given Staff's lack of information regarding other available providers, and the fact that no other carriers have been asked by this Commission to provide the required information, there is simply no basis for the Commission to assert jurisdiction pursuant to § 214(e)(3).

Even if it could be established that the Prescott Valley complainants are currently unable to receive basic service from any carrier, such a finding still may not be sufficient to trigger the Commission's authority to order involuntary service outside of Qwest's service territory. The

[5] 3-G Wireless, Alltell, AT&T, Nextel, Qwest Wireless, Sprint, T-Mobile and Verizon advertise to provide cellular service in Prescott Valley.

FCC has already tentatively concluded that the statutory requirement that "no common carrier will provide" service to an area "means something more than no common carrier is actually providing the supported services." FCC Notice 99-204, ¶ 92 (citing 47 U.S.C. § 214(e)(3)). In accordance with this FCC guidance, the Commission must take steps to seek voluntary service, and must find as fact that no carrier is willing to provide service, before ordering involuntary service. In order to comply with the FCC's competitive neutrality principle, the Commission must include a wide range of providers to determine whether any carrier is willing to serve complainants' area, which necessarily includes other types of service, such as satellite and cellular. *Id.*; FCC Order 97-157, ¶ 47.

2. Determining which carrier is best able to serve.

Once the Commission has found that an area is unserved and that no carrier is willing to provide service, then the Commission can proceed to determine which carrier is "best able" to provide service. FCC Notice 99-204, ¶¶ 93-96. Again, the criteria used in determining which carrier is best able to serve must be competitively neutral, and again, § 214(e)(3) offers no basis for the Commission to establish a presumptive requirement of wireline telephone service to unserved areas when other technologies are available. *See* FCC Order 97-157, ¶ 47. Thus, even if the Commission could establish jurisdiction to order service under § 214(e)(3), no remedy is possible under the statute without considering other carriers in addition to Qwest.

3. Funding the extension of service.

Finally, federal law requires that any involuntary service order must be funded through the universal service support mechanism (i.e., the Universal Service Fund ("USF")). Section 214(e)(3) itself is limited to "the services that are supported by the Federal universal support mechanisms," and specifically requires that the carrier or carriers ordered to provide service must be designated as USF eligible. 47 U.S.C. 214(e)(3). More generally, it is clearly

established that all USF funding must be "explicit and sufficient to achieve the purposes" of universal service. 47 U.S.C. 254(e); *see also* 47 U.S.C. 254(f) (any mechanism adopted must also be "specific, predictable, and sufficient," and must not "burden" federal universal service support). Universal service simply may not be promoted through subsidies hidden in the rate base of incumbent local exchange carriers. *Comsat Corp. v. FCC*, 250 F.3d 931, 938 (5th Cir. 2001). At present, the Commission is in the process of adopting a specific, predictable, and sufficient funding mechanism for USF distribution and use if involuntary service was ordered pursuant to § 214(e)(3). *See*, e.g., AUSF Docket No. RT-00000H-97-137. Without funding, any order to provide involuntary service outside of a carrier's service area would conflict with the language and intent of § 214(e)(3), and also could raise significant concerns.

Based on the foregoing, the Commission does not presently have authority to issue an Order sustainable on appeal that requires Qwest to provide involuntary service outside Qwest's service territory. In order to do so, the Commission must make specific findings of fact regarding other carriers, such as whether other carriers are willing or better able to provide service and whether basic services are already available to complainants via non-wireline technologies. The Commission must also provide an explicit and sufficient funding mechanism to compensate the involuntary carrier, such as Qwest, for the provision of telecommunications services outside of its service territory. Because the Commission admittedly does not have the information required to establish the necessary facts, because no other carriers are before the Commission in this proceeding, and because no explicit and sufficient funding mechanism is currently in place, the Commission cannot grant relief to the complainants. The matter should therefore be dismissed.

II. ALTERNATIVELY, THIS PROCEEDING SHOULD BE JOINED WITH THE AUSF OPEN DOCKET.

Alternatively, pursuant to A.A.C. R14-3-109(H), Qwest moves to consolidate the above captioned proceedings with the Arizona Universal Service Fund ("AUSF") Docket No. RT-00000H-97-137. Under A.A.C. R14-3-109, the Commission or presiding officer may consolidate two or more proceedings in one hearing when "it appears that the issues are substantially the same and that the rights of the parties will not be prejudiced by such procedure." The present proceeding involves consumer complaints filed against Qwest on July 9 and July 12, 2002 for not providing wireline residential service outside its current serving territory. Commission Staff has recognized that this proceeding implicates a much broader inquiry, including "how best to address unserved areas that result from population growth . . . ." Staff's Comments at 4.

As set forth above, the Commission cannot provide a remedy under § 214(e)(3) unless the scope of this proceeding is expanded to include all potential Arizona carriers. If the Commission believes that joining the necessary carriers to the present proceeding would involve a significant duplication of effort, a consolidation of proceedings would enable the Commission to resolve the broader policy issues relevant to the complaints as well as the AUSF Docket. The issues are substantially the same in both dockets. Establishing a method for promoting service in unserved areas in accordance with § 214(e)(3) is expressly within the scope of the AUSF proceeding.

The AUSF docket has essentially been open since 1997, and includes rulemaking that is necessary to establish methods and procedures for implementing the Commission's authority to order service under 47 U.S.C. § 214(e)(3). The Commission's Notice of Review published last year included a specific request for recommendations on "issues such as required population density before service to an area must be provided, the method for determining the serving

carrier, procedural process, etc." September 20, 2001 Steven M. Olea, Memo to Telecommunications Industry Members and Other Interested Parties, re: Review and Possible Revision of Arizona Universal Service Fund Rules (attached as Exhibit D). In addition, the AUSF docket will ultimately establish whether Arizona has a specific, predictable, and sufficient funding mechanism as required by § 254(f) and required before application of § 214(e)(3).

Consolidation of these complaints with the AUSF docket would offer three distinct advantages. First, Staff has already pointed out that this proceeding may have "implications . . . to other local exchange carriers, not a party to this proceeding." Staff's Comments at 4:22-5:2. Consolidation would cure many of the problems noted in Qwest's Motion to Dismiss because the Commission would have the other implicated carriers before it. Second, Staff has pointed out that the Commission should take into account "how to address unserved areas that result from population growth" beyond carriers' service territory boundaries. Staff's Comments at 4:20-22. Consolidation would ensure that the current complaints arising in the Prescott Valley area are resolved in a manner consistent with other similar complaints of remote rural areas and consistent with the requirements of § 214(e)(3).[6] Finally, consolidation would offer the Commission an opportunity to craft the implementing rules for AUSF and § 214(e)(3) in the context of a real case or controversy, thus ensuring that the rules are sound and workable.

Accordingly, if Qwest's motion to dismiss the Consolidated Complaint is not granted, Qwest's motion to consolidate this proceeding with the AUSF docket should be granted.

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[6] Qwest also notes that addressing universal service issues on an ad-hoc basis using questionable state common law authority is likely to raise at least two difficult constitutional questions. First, any prior state authority for ordering involuntary service to unserved areas may be preempted, at least to the extent state authority conflicts with the requirements of § 214(e)(3). Second, an ad-hoc order to provide involuntary service in the context of the Prescott Valley complaint without established rules and definitions could violate Qwest's due process rights. These issues are likely to arise repeatedly in this proceeding and in future proceedings if the problem is not addressed through appropriate procedures under § 214(e)(3).

III. CONCLUSION

The Commission lacks authority under state law to move forward in the Consolidated Complaints as set forth by Staff. The only possible authority to proceed in forcing Qwest to serve customers outside of its service territory remains 47 U.S.C. § 214(e)(3). In order to proceed under § 214(e)(3), the Commission must, among other things, join other Arizona carriers to determine which of those is best able to serve the Complainants' area. Failure to join these indispensable parties is grounds for dismissal. Alternatively, the Commission should consolidate this docket into the AUSF Docket No. RT-00000H-97-0137 to address the broad policy concerns and unique factors affecting the telecommunications industry in Arizona as a whole.

Respectfully Submitted this 4th day of November, 2002.

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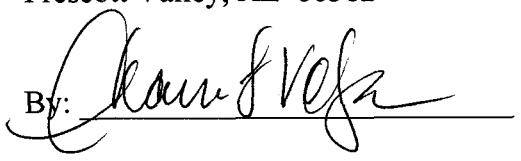
By: 

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Arizona
AZ Consolidated Dockets
STF 01-06
Attachment 4

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Maureen Arnold
Director – Policy and Law

ride the light
Qwest.

April 30, 2001

Deborah R. Scott
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

RE: Qwest Service Territory Inclusion

Dear Ms. Scott:

It has been brought to my attention that a few customers have working service outside of Qwest's authorized service territory as filed with the Arizona Corporation Commission. These customers have been identified as having working service after 1995. Commission Staff has been previously notified informally of some of these service additions.

Per A.A.C. R14-2-502 (B) 1, Additions/extensions to existing Certificates of Convenience and Necessity, "Each utility that extends utility service to a person not located within its certificated area, but located in a non-certificated area contiguous to its certified area, shall notify the Commission of such service extension."

The following addresses are identified as having service outside Qwest's service territory. Qwest will continue to serve these individuals, but no other customers located within that section would be considered for inclusion.

10150 and 10195 N. Paquito Valley Road, Prescott – Range 1W Township 15N Section 11
1035 N. Summer Sweet Lane, Prescott – Range 2E Township 14N Section 28
20300 W. Olive Ave., Waddell – Range 2W Township 3N Section 29

Please call John Duffy on 602 630-1183 or me if you have any further questions.

Sincerely,

Maureen Arnold

EXHIBIT A

Prescott Valley:
Telecommunication Carriers Approved to Provide Service Statewide
Residential Service

COMPANY	R/W[1]	ACTIVE[2]
@Links Network	W	N/A
1-800 Reconnex	R	A
Advanced Telecom	W	N/A
Allegiance Telecom	W	A
American Fiber Systems	W	N/A
Arbros Commu	W	N/A
Arizona Dial Tone	W	A
AT&T	W	A
Brooks Fiber Communications	W	A
Buy-Tel	R & W	A
Caprock Telecommunications	R & W	A
CenturyTel Solutions	R	N/A
CI[2], Inc.	R	A
Citizen's Long Distance Company	W	N/A
Comm South Companies	R	A
Concert Communications	R & W	N/A
Covad Communications	R & W	A
Cox Arizona Telecom	W	A
DMJ Comm. (Paloma Net)	R	A
DSLNET Communications	W	A
El Paso Networks	R	A
Electric Lightwave	R & W	A
Enkido, Inc.	R & W	N/A
Ernest Communications	R & W	A
Eschelon Telecom of Arizona	R & W	A
EZ Talk Communications	R	A
Global Crossing Local Services	W	A
Global Crossing Telemanagement	W	A
Group Long Distance	W	N/A
HJN Telecom	R	A
Intermedia Communications (Cypress Comm)	W	A
Ionex Communications North	R & W	A
IPVoice Communications	R & W	N/A
KMC Telecom	W	N/A
Level 3 Communications	W	A
Livewire Net	R & W	N/A
Local Gateway Exchange, Inc.	W	A
Looking Glass Networks	R & W	N/A
Max-Tel	W	A
McLeodUSA Telecommunications	R & W	A
Metromedia Fiber Network	W	A
Metropolitan Telecom	R & W	N/A

[1] R = Resale; W = Wireline
[2] Active carriers are those who are being billed on a monthly basis for interconnection and/or resale services as of 09/30/02.
PHX/1348507/67817.307

EXHIBIT B

COMPANY	R/W[1]	ACTIVE[2]
Momentum Telecom	R	N/A
Mountain Telecommunications	R/W	A
Mpower Communications (MGC)	W	A
Net-Tel	W	A
New Edge Networks	R & W	A
NOW Communications	R & W	A
Pac-West Telecom	R & W	A
PF.NET Telecomm	R	N/A
R.C.P. Services	R	N/A
RCN Telecom	W	A
Reflex Comm	W	N/A
Regal Telephone	R	A
SBC Telecom	R & W	A
Talk America	R & W	A
Tel West Comm	R & W	N/A
Teligent Services	W	A
Telseon Carrier	R & W	N/A
United States Telecom	R	A
Universal Access of Arizona	R & W	N/A
Valor Telecom CLEC of AZ	R & W	N/A
Vanion Telecom	R & W	N/A
Verizon Avenue (fka One Point)	W	A
Verizon Select Services	R & W	A
Vivo Comm	W	N/A
Winstar Wireless	R	N/A
XO Arizona, Inc.	R & W	A
Zephion Networks	W	N/A
Z-Tel Communications	R	A

COMPANY	R/W[1]	ACTIVE[2]
WIRELESS: Companies Currently Operating in Prescott Valley.		
3-G Wireless		
Alltell		
AT&T		
Nextel		
Qwest Wireless		
Sprint		
T-Mobile		
Verizon		

[1] R = Resale CLEC's; W = Wireline CLEC's

[2] Active CLEC's are those who are billed on a monthly basis.

ARIZONA CORPORATION COMMISSION

October 24, 2002

Timothy Berg, Esq.
Darcy Renfro, Esq.
3003 N. Central Avenue
Suite 2600
Phoenix, Arizona 85012-2913

Re: Staff's Responses to Qwest Corporation's Second Data Request
Docket No. T-01051B-02-0535

Dear Mr. Berg and Ms. Renfro:

Enclosed are Staff's responses to Qwest Corporation's **second** set of data requests to the Arizona Corporation Commission Utilities Division Staff in the above-referenced matter.

Please do not hesitate to contact me if you have any questions regarding the attached.

Sincerely,

David Ronald

David Ronald
Attorney, Legal Division
(602) 542-3402

DR:alb
Enclosure

cc: Maureen Scott
Connie Walczak
Pat Williams
Del Smith
Richard Boyles

EXHIBIT C

ARIZONA CORPORATION COMMISSION STAFF'S REPONSE
TO QWEST CORPORATION'S
SECOND SET OF DATA REQUESTS
REGARDING THE RATE APPLICATION
DOCKET NO.: T-01051B-02-0535
OCTOBER 24, 2002

DATA REQUEST NO. 2.3

Please identify and list any common carriers that are presently providing or offering non-wireline telecommunications service to the Complainants' Area. Non-wireline service may include, but is not limited to, cellular, satellite, or radio service.

RESPONSE:

The Commission does not approve the service territory of common carriers that provide or offer non-wireline telecommunications service in Arizona. Thus, the Commission does not have any records or maps that would provide this information.

RESPONDENT(S): Pat Williams, Compliance Division

ARIZONA CORPORATION COMMISSION STAFF'S REPONSE
TO QWEST CORPORATION'S
SECOND SET OF DATA REQUESTS
REGARDING THE RATE APPLICATION
DOCKET NO.: T-01051B-02-0535
OCTOBER 24, 2002

DATA REQUEST NO. 2.4

Please identify and define any terms or classification schemes used by Staff to identify persons or geographic areas with allegedly inadequate telecommunications service. Examples of such terms may include, but are not limited to, "open territory," "unserved areas," or "underserved areas."

RESPONSE:

1. "Open territory" and "unserved areas" are synonymous to Staff. Open territories are areas that are unserved by an incumbent local exchange carrier.
2. "Underserved areas" are service areas within an incumbent local exchange carrier's service territory where there are no facilities for providing local wireline telecommunications services.

RESPONDENT(S): David Ronald and Maureen Scott, Legal Division, Richard Boyles, Engineering Division

ARIZONA CORPORATION COMMISSION
September 20, 2001

TO: Telecommunications Industry Members and Other Interested Parties:

RE: REVIEW AND POSSIBLE REVISION OF ARIZONA UNIVERSAL SERVICE FUND RULES, ARTICLE 12 OF THE ARIZONA ADMINISTRATIVE CODE (DOCKET NO. RT 00000H-97-0137)

The Arizona Corporation Commission ("Commission") has directed Commission Staff ("Staff") to pursue a review of the Arizona Universal Service Fund ("AUSF") Rules (R14-2-1200 series). When the original rules were adopted on April 26, 1996, Arizona Administrative Code R14-2-1216 required that within three years a comprehensive review of Article 12 be performed. A rules docket (Docket No. RT-00000H-97-0137) was opened on March 14, 1997, for this purpose and Staff began the review process.

The Commission desires to now complete this process, therefore, Staff is soliciting updated comments on initial comments from all interested parties on the questions attached as Exhibit A.

Other factors and issues which Staff asks parties to consider in their comments are:

- Changes in Federal law since 1996
- Universal service actions taken by other States
- New Federal Communications Commission Orders
- Whether rules for under-served and unserved areas should be included in this or an independent article in the rules

Based on the comments, Staff will formulate and forward a proposed draft of the revised AUSF rules to all interested parties. Interested parties will have an opportunity to provide written comments on the draft rules and participate in a subsequent workshop(s). Staff anticipates beginning the formal rule making process after the workshop process is completed.

Please submit an original and ten copies of any comments to Docket Control no later than November 2, 2001, referencing Docket No. RT-00000H-97-0137. Thank you for your interest and participation in this important process.

To be placed on the formal service list in this docket please notify, in writing, Ms. Sonn Ahlbrecht at the Phoenix address below. If such notification or comments are not received by November 2, 2001, you will not be placed on the formal service list and will no longer receive Commission mailings regarding this issue. If you have any questions, please feel free to contact Ms. Ahlbrecht at 602-542-0855.

Sincerely,

Steven M. Olea
Acting Director, Utilities Division

SMO/dwc:mi
cc: Chairman William A. Mundell
Commissioner Jim Irvin
Commissioner Marc Spitzer
Chris Kempley, Legal Division
Maureen Scott, Legal Division
Sonn Ahlbrecht, Utilities Division

EXHIBIT D

EXHIBIT "A"

1. Are there areas within the existing rules where revisions should be made? If yes, please provide specific language recommendations and explain the benefit of the recommended revision.

2. How might the AUSF rules be amended to ensure the availability of wireline telephone service in unserved areas (open territory)? Please provide specific recommendations on issues such as required population density before service to an area must be provided, the method for determining the serving carrier, procedural process, etc.

3. How might the AUSF rules be amended to increase the availability or affordability of wireline telephone service in under-served areas? Under-served areas are defined as areas within a wireline carrier's service territory where construction or line extension charges apply.

4. Under what circumstances, if any, could AUSF be made available to carriers that do not have Eligible Telecommunications Carrier status?

5. Should the definition of local exchange service, for AUSF purposes, be broadened to include other services? If yes, how might it be accomplished?

6. Are there USF rules in other states that should be adopted in Arizona? If yes, please provide the specific language for each rule and explain the benefit that would be derived by adopting the rule in Arizona.

7. How might construction or line extension tariffs be standardized between companies? Should there be an AUSF contribution in addition to the company contribution? Should there be a maximum amount a customer should be expected to pay to obtain service? Should this amount consider the median household income of the area being served. Assuming there is an AUSF contribution, what is a reasonable limit?

8. Are there changes in the Federal USF rules of which Staff should be aware? If yes, please identify them. How do these changes impact current AUSF rules? How might they impact recommended revisions to the existing rules?

9. Are there changes in other Federal rules that might impact current or future AUSF rules? If yes, please identify them and their potential impact.

10. For all other comments please provide a narrative fully explaining the issue being discussed, any recommendation and the benefit to be gained if the recommendation is adopted.